IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF DAVID MORGOCH ALLEGING DISCRIMINATION IN EMPLOYMENT BY THE CITY OF OTTAWA ON THE BASIS OF HANDICAP

APPEARANCES

Anthony Griffin	On behalf of the Ontario Human Rights Commission
Carey Thomson	On behalf of the Respondent

DECISION

INTRODUCTION

In his complaint of September 25th, 1985, as amended on the 16th of November, 1988, David Morgoch, who suffers from seasonal allergies, alleges that his 1985, 1986 and 1987 applications seeking employment as a fire fighter with the City of Ottawa were rejected because of that handicap, thereby infringing his right to equal treatment in employment in contravention of sections 4(1) and 8 of the Ontario Human Rights Code, 1981 (Statutes of Ontario, 1981, Chapter 53, as amended by 1984, Chapter 58, s. 39 and Chapter 64, s. 18, and hereafter referred to as "the Code").

These provisions of the Code read in part as follows:

> 4.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... handicap.
>
> 8. No person shall infringe or do directly or indirectly, anything that infringes a right under this Part.

The expression "because of handicap" is defined in section

9(b) in such terms as to clearly include allergies and asthma and, as the respondent (the City of Ottawa) readily acknowledges this to be the case, it is unnecessary to review the argument made to that effect by counsel for the Ontario Human Rights Commission ("the Commission").

The respondent admits having excluded the complainant from proceeding beyond the medical examination stage of its multi-staged recruitment process upon learning of his allergies, thereby denying him equal treatment with respect to employment because of that handicap. Indeed, in the course of argument counsel for the respondent not only acknowledged that counsel for the Commission had "accurately stated what the law is" regarding the issue of liability in this matter (Evidence, Volume 9 p.69), but he conceded that the Commission had established a prima facie case of discrimination contrary to sections 4(1) and 8 of the Code (Volume 9, p. 85). However, the respondent contends that it was justified in such discrimination by section 16(1)(b) of the Code because in its view this particular handicap renders Mr. Morgoch "incapable of performing or fulfilling the essential requirements attending the exercise" of the employment in question.

It is incontestable that the symptoms suffered by persons afflicted with allergies and (or) asthma exhibit a vast range of impairment, from the barely discernible to the clearly disabling. The Commission and complainant concede that such conditions might render a particular individual incapable of fulfilling the duties

of a fire fighter, but they maintain that it is not permissible to exclude anyone from employment on the basis of a generalisation regarding a particular handicap and in disregard of the actual abilities of the individual concerned. Rather (as counsel for the respondent ultimately agreed), the legal position is as stated by Professor Cumming in John Beliveau v Steel Company of Canada et al (1988), 9 C.H.R.R. D/5250, at p.D/5251:

> The structure of the Code places the onus on the employer to establish that the handicapped person is incapable of performing the essential duties of the job, and at the same time establish that the employer cannot take affirmative steps to reasonably accommodate the individual's handicap.

Moreover, quite apart from the matter of onus of proof, it is the Commission's contention that the medical reports supplied to the respondent by Mr. Morgoch in support of his application showed plainly that his condition did not incapacitate him from working as a fireman. The Commission maintains, therefore, that section 16(b) of the Code cannot justify the way in which the complainant was treated.

The hearing into this matter was fairly lengthy, involving considerable evidence relating to the physical demands involved in the duties of a fire fighter and extensive expert evidence as to asthma and allergies, in general, and the medical condition of the complainant, in particular. As it turned out, there was no real conflict between the evidence adduced by the Commission and the respondent, and the matter of liability was resolved to one issue: Was the City of Ottawa justified in concluding that the complainant's condition rendered him incapable of carrying out

the duties of a fire fighter with the Ottawa Fire Department? I have concluded that the answer to that question is "no" and, after dealing separately with my reasons in that regard, I will turn to the applicable remedies.

THE MATTER OF LIABILITY

The complainant, David Morgoch, grew up and attended high school in Mississauga, Ontario. At age nineteen, while working in a muffler-installation shop, he began to experience coughing spasms, chest congestion, watery eyes and other symptoms of allergies. He was then referred by his family physician to Dr. William-Paul Warren, an allergist in the City of Toronto, who has continued to treat him for his allergies ever since.

Prior to 1985 Mr. Morgoch's allergic reactions had become seasonal (May-June), and the evidence shows that he had them well under control with medications prescribed by Dr. Warren. The medication regime followed by Mr. Morgoch, mainly during the pollination season in the Spring, involves the use of sodium cromoglycate inhaled through the use of a "Fivent Inhaler", the same substance used in the form of eye-drops under the trade name "Opticrom", an aqueous nasal spray known as "Beconase Aq.", an aerosol medication called "Beclovent", and a salbutamol inhaler called "Ventolin".

By January of 1985 the complainant had been employed by Ontario Hydro for some eight years at its nuclear power plant in Deep River, Ontario. He had also become actively involved as a volunteer fire fighter with the Fire Department of the United

Townships of Rolph, Buchanan, Wylie and McKay. The evidence of several witnesses shows that his performance with that Department was above average, and he eventually took on the added role of training officer. He followed a number of fire fighting courses and devised instructional programmes of his own involving lectures, demonstrations and hands-on training. The evidence shows clearly that in his capacity as a volunteer fire fighter the complainant was exposed on numerous occasions to smoke and other toxic conditions associated with fires with no more discomfort or ill-effects than those suffered by non-allergic fire fighters. Indeed, one witness testified that Mr. Morgoch generally remained at the scene of fires longer than others.

Having learned of the impending closure of the hydro plant, and wishing to remain in the general area of eastern Ontario, Mr. Morgoch obtained the necessary forms and applied to the City of Ottawa for employment as a fire fighter on January 28th, 1985.

His application and supporting documents were satisfactory, and Mr. Morgoch was invited to sit for the written examination administered in February of 1985 as "Stage 2" of the recruitment process. In the middle of March he was advised that he had passed that examination and that a security check was being processed by the Ottawa Police Force. Later that month he was informed that he had passed the security check as well and that the next stage was the medical examination. He was given a "pre-employment health assessment questionnaire" to be completed by himself, and a "pre-employment medical examination form" to be completed by his

doctor.

One section of the questionnaire requires the candidate to state which (if any) of a list of forty medical conditions he or she has, or has ever had. The list includes "asthma" and "hayfever, allergic reactions". Mr. Morgoch indicated that he had "minor allergies - allergies controlled". The City then returned his medical forms under cover of a form letter requiring further information and clarification regarding a number of matters including his allergies and asking for a doctor's report on the types of allergies from which he suffered, the treatment he was receiving for them and his present condition in that regard.

In response to this request, Mr. Morgoch forwarded a medical assessment from his doctor in Deep River, Dr. Heathcote, responding to the various other inquiries and stating that: "David has seasonal allergies, mainly pine pollen, which are well controlled by Fivent inhaler and Opticrom eye drops. He has no restriction in activity". The complainant also wrote to his allergist, Dr. Warren, who forwarded the following report:

> [Mr. Morgoch] has been a patient through my office since August 1974, and he has what I consider to be a well controlled allergic rhinitis and asthma. He mainly has seasonal problems with the springtime being the most severe season..
>
> His latest set of skin tests, done in September of 1979, showed positive reactions to feathers, dust, cat, dog, silk, wool, grass, tree, ragweed, plantain, pollens, milk, egg, nuts, chocolate, house dust mite, and a variety of atmospheric molds.
>
> Over many years he has had recurrent spirograms done and these have always been in the super-normal range with the last one of 25 April 1985 showing a resting FEV1 of 5725 out of a predicted 4400, FVC 6700 out of

> 5600, FEF greater than 20 out of 8.5.
>
> His tympanograms have always been normal as well.
>
> I think that this man's allergy problems are under very good control using topical therapy only and this is basically on a seasonal basis only. During the heavy pollen season he will use Beconase spray two puffs in each nostril once or twice a day, Fivent three puffs three times a day, and Ventolin spray with Beclovent spray if necessary. At times he uses some Opticrom drops to the eyes, but this is also on quite an irregular basis and basically only at the very height of pollen seasons.
>
> I see no contraindication from the point of view of allergy or chest for this man to be accepted as a fire fighter, and in my practice I have a number of patients who have been fire fighters for years and can tolerate the work very well.

When Dr. Warren was testifying he was asked about his "patients who have been fire fighters for years and can tolerate the work very well". He said that two of his long-time patients are City of Toronto fire fighters whose files he had examined before his appearance as a witness, and that he may have some others as well that he would not remember "until they sit in front of [him]". Each of the two patients whose records he had re-examined suffer from perennial allergies, the condition of one of them also involving "seasonal exacerbation". Both suffer from rhinitis and intermittent episodes of bronchitis. He classified them as "mild to very mild asthmatics" and went on as follows (Volume 8, p. 52):

> They've had absolutely no difficulty. On days that they're very bad will be a day that they may call in sick which will - - once, twice a year for a day here or a day there at most. One of them hasn't missed a day in a couple of years, even with his episodes of problems.

In the same vein, it was disclosed by lieutenant Kenneth Currie, an active twenty year veteran of the Ottawa Fire Department, that he has suffered from allergies (including "hayfever") on a seasonal basis (May to end of July) for the last thirteen years. He was called "a capable fire fighter" by James A. Donaldson, the Department's Chief of Training, whose evidence dealt mainly with the physical demands of fire fighting. When asked about his concerns as to the effect upon fire fighters of smoke and other irritants, Mr. Donaldson concluded that his concerns were the same regardless of any question of allergies. (See volume 5, p. 22.)

As to the capacity of mild asthmatics to be fire fighters, it may be noted that Dr MacLeod suggested in the written opinion he provided to Dr. Hughes that it might be discriminatory to deny them that opportunity. In his testimony he said that "someone who is classified as asthmatic but is just barely over the line of being normal would not suffer dramatically differently from a normal person" (Volume 6, p. 23). It was Dr. Warren's view that if an asthmatic fire fighter started his work day "with no clinical evidence of airways obstruction that day, then I would not expect him to be significantly worse off than another person off the street who was quite healthy." And, of course, Mr. Morgoch's prophylactic medications were designed to prevent airways obstruction, thus placing him on the same footing as others in this respect. Dr. Warren added that the two fire fighters who are patients of his "will take a puff of Ventolin

before they leave the station, just as a precautionary thing ... It puts them into the same position as everybody else."

Despite the medical reports supplied by him, the City sent Mr. Morgoch another form letter on June 26th, 1985, advising him that his "health status [did] not meet [the] requirements" and that his "application for employment as a fire fighter [was therefore] rejected." He was also advised that if his health status improved he might "reapply to join the next recruitment process prior to February of the next year."

As the rejection letter was not specific in that regard, Mr. Morgoch wrote to the respondent on July 10th, 1985, asking to be advised "as to what it is about my health that [was] found substandard." He was informed by telephone that the problem was his allergies. Having asked for this information in writing for the sake of his records, he received a letter dated August 13th, 1985, from the City's Occupational Health Co-ordinator, Mimi Sincennes (who is also an "occupational health" nurse), referring to the telephone conversation, expressing the hope that his health status would improve so that he could qualify the next year if he wished to re-apply, and stating that:

> As mentioned, your health status will be reassessed upon proof that you have been symptom free for one year, without medication, accompanied by the result of allergy tests done at the time of the re-application.

This decision (which was referred to at various times as a "temporary fail") was based on the advice of Dr. Hughes, who was (and remains) the "occupational health" medical consultant to the City, having as one of his responsibilities the giving of advice

on health issues regarding applicants for various jobs. It was his testimony that the medical aspects of applications for the position of fire fighter are dealt with by the City's occupational health nurse in accordance with the health standards set out in chapter 4 of the fire fighters recruitment manual, which chapter he referred to as "the bible". Where clarification of medical reports or tests is required his opinion and (or) advice is sought on a consulting basis.

It would appear that the health standards set out in the so-called "bible" apply only to recruits. Members of the force do not seem to be required to maintain these standards on pain of dismissal. For instance, the standards require that the body fat of male recruits be in the range of 15% to 20%, while that of females must be between 20% and 25%; the standards also require candidates to have 20-20 vision, neither glasses nor contact lenses being permitted. Yet, according to Mr. Donaldson, members of the City's Fire Department are not removed from active fire fighting duties simply because they acquire too much body fat, or come to need glasses.

With respect to Mr. Morgoch's application, the relevant article of the 1985 health standards reads as follows:

> 4.15.1 <u>Allergies</u>
>
> There are various types of allergies:
>
> a) Nasal allergies manifested by sneezing, stuffed and runny nose, itching.
>
> b) Bronchial allergies or asthma causing cough, wheezing, difficulty in breathing.

> c) Skin allergy accompanied by itching.
>
> d) Any allergic manifestation may be cause for rejection.
>
> e) Any reaction on allergy testing is cause for rejection.
>
> f) Seasonal allergies, not requiring treatment, will be tolerated.
>
> g) If under treatment, it should be considered a temporary rejection and candidate can be considered again when treatment is completed and condition is regarded as normal.

Dr. Hughes testified that he was consulted by Mimi Sincennes in relation to Mr. Morgoch's 1985 application and that together they reached the decision that was reported to Mr. Morgoch in terms closely paralleling the provisions of article 4.15.1. It was a decision that Dr. Hughes characterized as a "judgment call" in relation to a borderline case (see Evidence, Volume 7, at p. 88). Dr. Hughes' testimony under cross-examination regarding this initial decision is as follows (beginning at p. 93 of Volume 7 of the evidence):

> Q. ... and you and Mimi Sincennes made a decision that based on what you'd seen this looked like too much medication for this man to be a fire fighter?
>
> A. Yes.
>
> Q. You didn't consult any experts in 1985, did you?
>
> A. I didn't consult any experts in writing. ... I consulted experts to whom I regularly refer on the phone.
>
> Q. But you didn't speak to Dr. Warren, did you?
>
> A. No, I didn't.
>
> Q. You didn't write to Dr. Warren?

A. No.

Q. You didn't hear anything from Dr. Warren except what you read in his letter.

A. That's all.

Q. And he was Dr. Morgan's allergist. Most familiar with this man's use of medication.

A. Yes.

Q. There was no one else more familiar.

A. Yes.

Q. And you made your decision without speaking to him.

A. Yes.

Q. You've never sought his advice on Mr. Morgoch?

A. Never.

Q. Isn't it part of the assessment process to try and get the best and the most information in order to make an informed decision?

A. Yes, it is.

Q. So the more firsthand the information you can get the better it would be?

A. Yes.

Q. It's safer to be better informed, particularly when you're making the judgment calls instead of the clear cut cases?

A. Yes.

As a result of this decision Mr. Morgoch filed his complaint of September 25th, 1985. He realized that he could not abandon his medication and remain symptom free for an entire year. He was determined, nevertheless, to pursue his ambition to become a fire fighter with the Ottawa Fire Department and so he re-applied in February of 1986, re-submitting the material he had provided

previously.

At the end of April, or the beginning of May, he received a call advising him that the security clearance deadline had passed and that the deadline for submitting the medical questionnaire and examination form (to be completed by his doctor) was being "infringed on". It happened that these delays were caused by the City having neglected to send him the necessary forms, and Mr. Morgoch described the conversation as one in which the respondent was "trying to get me to become disinterested." In any case, the forms were sent by courier at his request under cover of a letter dated May 2nd. They were duly completed and returned by the complainant on May 16th. This prompted a letter from the City (dated June 13th, 1986) advising him that more medical information was required and that, as indicated to him in relation to his previous application, proof was required that he "had been symptom free for one year, without any medication, accompanied by allergy tests done at the time of the present application." Mr. Morgoch's reply of July 1st indicated that he had not been symptom free during the past year, that he had continued with his medication and that Dr. Warren saw no need for new allergy tests (which, as Mr. Morgoch testified in another connection, was an unpleasant experience).

Prior to the City's receipt of Mr. Morgoch's letter, Mimi Sincennes and Dr. Hughes had discussed the matter again, leading Dr. Hughes to seek expert advice. On July 1st, in his capacity of "Consultant, Occupational Health, City of Ottawa", Dr. Hughes

wrote identical letters to Dr. MacLeod, a respirologist, Dr. Dehejia, an allergist, and Dr. McLean, a pharmacologist. That letter reads as follows:

> We have developed over the years a very strict screening program for recruiting fire fighters, which we would like to expand into an ongoing evaluation of health in order to maintain an above-average level of safety. However there are some strong objections to some of our standards, especially from those concerned with violations of human rights.
>
> May we respectfully beg your opinion on the matter of allergies and the use of medication. We state quite clearly that ongoing allergic problems requiring medication will be cause for rejection. We feel that a fire fighter cannot safely carry around aerosol medications on his/her person for obvious reasons, and additionally the side-effects of these medications inhibit maximal performance, physically and mentally.
>
> Recently we received communication from an allergist saying: "During the heavy pollen season he will use Beconase ..., Fivent ... and Ventolin spray with Beclovent spray if necessary. At times he uses Opticrom drops for the eyes, ... etc. I see no contraindication from the point of view of allergy or chest for this man to be accepted as a fire fighter."
>
> We feel that this amount of medication even seasonally is unacceptable where fire fighters have an all-season job and may work in less than satisfactory environments from an allergy point of view. They often come into contact with smoke-borne particles which are strong respiratory irritants and which may be inhaled even before fitting with the protective mask.
>
> In soliciting your opinion, we request that you submit your usual fee for this consultative advice..

The "we" referred to throughout this letter is the "occupational health group" in the City's Department of Human Resources which, according to Dr. Hughes, is simply an informal group comprising himself and the City's occupational health nurses. Presumably these nurses would defer to the opinion of the medical doctor engaged by the City on an on-going basis as its occupational health consultant, and I have no doubt that the

controlling view throughout was that of Dr. Hughes.

In this regard, Ms. Lynn Murray, who is the City's Director of Human Resources Administration, testified that her Department normally handles employees after they are hired, and that a branch known as Human Rights Services, did the hiring. However, the Occupational Health Unit, which was under her direction, "would get involved, and certainly in the fire fighter recruitment process Occupational Health was an integral aspect of the hiring process". (Evidence, Volume 7, p 2.) Ms. Murray, who referred to Dr. Hughes as "our physician" (i.e., the City's physician), indicated that decisions to reject applicants on medical grounds were taken in accordance with the views of the Occupational Health Unit. Similar evidence was given by Ms. Jill Bates, who has been the director of Human Resources Services since January of 1986, prior to which she was the Director of Recruitment and Classification. She never had "any personal or professional involvement with the medical test stage of the recruitment process" (Evidence, Volume 4, p.57.), it being the Occupational Health Service that makes such determinations. Clearly, in respect of such matters, the City's officials relied on its occupational health nurses whom they knew were virtually certain to adopt the views of "the City's physician".

The allergist's communication which was referred to in Dr. Hughes' letter is, of course, Dr. Warren's 1985 letter written thirteen months previously and now being quite belatedly followed up on and, as indicated elsewhere, in an inappropriate manner.

A final observation that I would make regarding Dr. Hughes' letter is that, in stating so firmly the view already held by him, and in emphasising the need for a "strict screening process" and the maintenance of "an above-average level of safety", that letter does not seem conducive to obtaining the best possible objective response. It appears, rather, to be seeking confirmation of that which it suggests verges on the self-evident.

Replies to these letters from Dr. Dehejia and Dr. MacLeod were received by Mimi Sincennes towards the end of July. Although Dr. McLean did not reply himself, the coordinator for the Ottawa Valley Regional Drug Information Service (Carol Repchinsky) responded to that letter on September 9th. I will come to these replies presently.

On July 13th, 1986, the following up-date of Mr. Morgoch's condition was at his request provided to the City by Dr. Warren:

> [Mr. Morgoch] was in for follow-up examination on 9 May 1986, and he has put in a very good year from an allergy point of view with little to no problem along the way. He has found that by using medication in the form of Fivent and Ventolin as a background he has been able to keep things under control at the worst of his season, which now lasts a day or two.
>
> On examination he had slightly pale and boggy nasal mucosa and his chest was clear.
>
> His spirogram was absolutely normal with a resting FEV1 of 5525 out of predicted 4400, FVC 6500 out of 5600, FEF 20 out of 8.5. This was taken at the height of what should be his bad season.
>
> His tympanograms were normal.
>
> This man is under excellent control as far as allergy is concerned, and there is absolutely no

> contraindication from a medical point of view to his being able to work fulltime as a fire fighter.

In his reply to Dr. Hughes' letter, Dr. MacLeod stated that he would consider the rejection of fire fighter recruits to be justified on medical grounds in these two situations (the first of which relates to allergies, regarding which condition he is not an expert):

> 1. Any chronic disease requiring antihistamines to control symptoms, e.g., "hayfever". [This is "because of the tendency of all antihistamines to cause sedation".]
>
> 2. Asthma, with the possible exception of people whose asthma is so mild that their PC20 is equal or greater than 8.0 mg/ml. ["A person whose PC20 exceeds 8.0 would never require regular use of Ventolin or theophyllines and their symptoms would be entirely controlled with the use of chromoglycate or steroid aerosols. They would lose no time off from work because of asthma and would rarely have any wheezing. Their reaction to smoke inhalation in terms of bronchospasm would be only slightly greater than a normal individual, and this would not require any time off work for the "normal" amounts of smoke inhalation. My suggestion of a PC20 of 8.0 as the lower limits for accepting asthmatics as fire fighters is somewhat arbitrary, but can be defended on a number of grounds", including the requirements regarding airline pilots. ... [Mild asthmatics] could conceivably perform as fire fighters with very little increase in risk, and perhaps it is a form of descrimination (sic) to reject" such a person.]

Dr. MacLeod is the Chief of Respirology at the Ottawa Civic Hospital and an associate professor at the University of Ottawa. He explained the "PC20" test in his testimony at the hearing, and an essentially similar explanation was provided by Dr. Grossman who was called as an expert witness on behalf of the Commission and the complainant. Dr. Grossman is the Head of Respirology at Mount Sinai Hospital in Toronto, and he is an assistant professor

of medicine at the University of Toronto.

The PC20 test is designed to measure or assess the subject's predisposition to an asthmatic attack by having him or her inhale an irritant (usually histamine or methacoline) in increasing dosages until there is a 20% reduction in that person's "FEV1". The letters "FEV" stand for "forced expired volume", and the FEV1 is the amount of air that the subject exhales in the first second of maximal exhalation. The letters "FVC" mean "forced vital capacity", which is the total volume of air exhaled. A person's FEV1 and FVC may be measured by a spirometer without "challenging" that capacity through having the subject first inhale an irritant, and a simple spirogram is what is usually taken in the allergist's office. The reading is then expressed by showing the volume of air exhaled by the subject followed by the volume of air that is predicted for a normal person of the same age, sex and weight. For instance, Mr. Morgoch's spirograms as reported by Dr. Warren in his 1985 letter (which he said "have always been in the super-normal range") showed a resting FEV1 of 5725 out of a predicted 4400, and an FVC of 6700 out of 5600. These were characterized as "super-normal" because they show a capacity exceeding the best expectations for normal persons of like sex, age and weight.

The PC20 test also measures the subject's FEV1 and FVC, but in the context of exposure to an irritant through inhalation. The normal person experiences a 20% reduction in these capacities when the amount of irritant inhaled exceeds 16 milligrams per

millilitre or cubic centimetre of air inhaled. The evidence of both respirologists indicated that asthmatics are usually classified according to the PC20 test as being "mild" if the PC20 reading is between 8.0 and 16.0, "moderate" if between 2.0 and 8.0, and "severe" if under 2.0.

At this point I find it helpful to comment on various aspects of the statements made by Dr. MacLeod in the opinion he gave to Dr. Hughes:

1. "A person whose PC20 exceeds 8.0 would <u>never</u> require regular use of Ventolin ..." Dr. Grossman qualified his general agreement with the statement of which this is a part by observing that he had been trained never to say "never"; and under cross-examination, Dr. MacLeod acknowledged that his use of the word "never" was an exaggeration. He really meant "rarely". In any case, it was Dr. Warren's evidence (Volume 8, p. 35) that the complainant's need for Ventolin was <u>rare</u> - a fact which Dr. Hughes could have ascertained at any time following Mr. Morgoch's initial application had he but bothered to contact the person acknowledged by him to be the best possible source of medical information regarding the complainant's condition: Dr. Warren.

2. "... and their symptoms would be entirely controlled with the use of chromoglycate or steroid aerosols ...", as Dr. Hughes has known all along to be the case with Mr. Morgoch.

3. "... They would lose no time off from work because of asthma ... ". Mr. Morgoch's employment record shows that he has missed only 14 days work in the last 12 years. Of these, eight days were related to difficult pregnancies encountered by his wife. He could not remember why he missed the other six, or whether they had anything to do with his allergies.

The reply received by Dr. Hughes from Dr. Dehejia, the allergist he consulted, qualifies the first ground of rejection suggested by Dr. MacLeod whose specialty is not allergies. Dr. Dehejia indicated that there is a vast range of symptoms

exhibited by persons with allergies and that, while those "with severe or even moderately severe symptoms" cannot function as fire fighters, others can. He also mentioned that "there are two new antihistamines (Seldane and Histamal) which do not cause any drowsiness and have been cleared for use by airline pilots."

Although Dr. McLean did not himself reply to Dr. Hughes' letter, the pharmacological information requested was forwarded by Ms. Repchinsky. Dr. Hughes had indicated that, "for obvious reasons", it would be unsafe for a fire fighter "to carry around aerosol medications on his/her person." In his evidence he indicated that what prompted this was his assumption that such a container might explode. The answer he got was that the fire fighter would have to be on fire himself before the container got hot enough to explode, the accuracy of which conclusion he readily accepted in his testimony. However, despite his knowledge to the contrary, Dr. Hughes continued to cite this concern as a reason for rejecting the complainant.

Dr. Hughes had also expressed concern over the side effects of these various medications, and the answers in that respect were as follows:

> Systemic side effects from inhaled corticosteroids [the Beconase and Beclovent] are virtually nonexistent. Cromolyn is considered a very safe drug; side effects from aerosol inhalation [the Fivent inhaler] are rare. Ventolin spray is salbutamol ... delivered by mouth inhalation [and] side effects are minor - if they occur at all.

It may be noted that Dr. MacLeod did not offer any opinion regarding the side effects of these medications. This might have

been because it was indicated at the end of the letter that a copy had been sent to a pharmacologist. Be that as it may, Dr. Hughes did not pursue further with him that aspect of his query. Had he done so, he might well have received from his expert respirologist the information that was provided by the Commission's expert, Dr. Grossman, in his testimony (beginning at p. 261, Volume 2). According to Dr. Grossman, who has been involved in the clinical testing of various drugs, the side effects of Fivent are "virtually none ... it's an exquisitely safe drug". He had never encountered even the side effects associated with using it in a dry form by means of a "spinhaler", as opposed to an "inhaler". He said that the only significant side effects from Beclovent are that fewer than 5% of its users develop a throat fungus which is easily controlled simply by rinsing the throat with water. Opticrom is the same drug as Fivent, but in eye drop form, and he had never observed it to have any side effects in the course of his considerable experience. As to Beconase, its users "occasionally feel a little bit of burning in their nasal mucosa, but other than that there are no side effects." Finally, Dr. Grossman testified that thousands of his patients have used Ventolin and only rarely did any of them experience any side effects. Ventolin may be taken in tablet form. The side effects that occur in about 10% of tablet users are tremor and palpitations, but "because the dose is so much lower using the inhaler, the incidence of side effects [with the inhaler] is closer to 1%. So it is an exquisitely well-

tolerated drug - so well tolerated that I believe it's the second most popular drug in the world today, a phenomenally successful drug."

On October 15th a fact finding conference took place in respect of Mr. Morgoch's complaint, and this resulted in Mr. Morgoch's agreeing to being examined by Dr. Dehejia who reported on November 12th that:

> Allergy skin testing showed strong reactions to tree pollens, moderate reactions to house dust and minimal reactions to the pollens of grasses and ragweed and the spores of molds.
>
> The patient tells me that he is currently working as a volunteer fire fighter. I do not foresee any medical problems from the allergic standpoint in this patient working as a full-time fire fighter.

Although there was no evidence that Mr. Morgoch was either given a PC20 test by his allergist, or asked by the respondent to submit himself to one when he agreed to being examined by Dr. Dehejia, Dr. Warren's assessment that his asthma was "completely controlled and extremely mild to mild at the worst" (Evidence, Volume 8, p.56) cannot be gainsaid. His spirograms were "super-normal", and his personal experience when exposed to the smoke involved in fire fighting lends further support to this classification of his condition. Moreover, in light of his previous generalization that patients with moderately severe symptoms cannot be fire fighters, Dr. Dehejia obviously must have regarded Mr. Morgoch (whom he later examined) as a mild asthmatic at worst in order to have reported on November 12th, 1986, that there was no medical impediment to his working as a full-time

fire fighter. Although Dr. Hughes did not have the benefit of his opinion, it may be noted at this point that, after reviewing the complainant's entire medical history, Dr. Grossman concluded as follows in his report of May 9th, 1989 (Exhibit Number 10, tab 2):

> Mr. Morgoch has, at worst, mild seasonal asthma which is well controlled by a combination of Fivent and the intermittent use of inhaled bronchodilator and corticosteroid. It is likely that his bronchial reactivity would either be normal (especially if he were using Fivent and Beclovent regularly) or again, at worst, only very mildly impaired. For most of the year he has no asthma symptoms and his bronchial reactivity would likely be normal. From this discussion, it follows that his asthma should not be a problem in his desired line of work even though I recognize that he would be exposed to a wide variety of non-specific irritants.

According to Dr. Hughes, the replies to his three inquiries were reviewed by him with Mimi Sincennes and at least one other of the City's occupational health nurses (see Evidence, Volume 7, pp. 79 ff.). He felt at the time that Dr. MacLeod's report "seemed to support our case that indeed he [Dr. MacLeod] also felt that in situations similar to civil aviation medicine that fire fighters were in a particularly delicate position as far as their health and safety was concerned." (Emphasis added.)

This extract from Dr. Hughes' testimony reveals an attitude that seems to have pervaded the handling of this affair - and, in my opinion, the City must take responsibility for the actions of its servants and agents in this regard.

From the moment the City became aware of his handicap, its duty to Mr. Morgoch was to accord him equal treatment unless he

was in fact incapable of doing the work. The fulfilment of this duty called for specific inquiries relating to the applicant himself. The City ought to have known this from the beginning; but even if it did not, that ignorance would be no justification. Certainly after receiving Mr. Morgoch's complaint the City ought to have realized that the appropriate course of action was to determine whether the complainant's handicap in fact rendered him incapable of functioning as a fire fighter. General inquiries concerning their "standard" might be called for as part of a continuing process of improvement, or in the shaping of future policy - triggered, perhaps, by the desire to conform with the requirements of the Code. However, in the context of dealing with a specific application such inquiries were in my view quite out of place, and particularly so when couched in a form calculated to evoke, if possible, that standard's approval. In any case, it would seem that the City's agents in this matter did not truly want assistance in developing appropriate standards for the future. Their minds had been made up, and there was a case for which support was being sought. In my view that bias shows clearly in the manner in which Dr. Hughes' letter suggests the answers it purports to seek.

Dr. Dehejia's view - formed after actually examining the complainant - that there were no foreseeable medical problems attendant upon his working as a full-time fire fighter was similarly discounted. Dr. Hughes "felt" that there was some inconsistency between that opinion, on the one hand, and the

earlier report from Dr. Dehejia together with Mr Morgoch's own information as to his medication, on the other. However, no attempt was made by Dr. Hughes to contact either Dr. Dehejia or the complainant's doctor for clarification. Rather, with nothing further ado, Dr. Hughes, who said he "was just asked for [his] advice whether we should temporary fail [Mr. Morgoch] again", suggested to the City that "that probably would be wise."

During the course of cross-examination, Dr. Hughes made the following admissions:

(1) That the question as to the safety of carrying aerosol medications into fire areas had ceased to be of concern in the assessment of Mr. Morgoch's medical status in respect of his application.

(2) That Fivent was known to be a safe drug, without significant side effects.

(3) That Ventolin was reputed to have side effects which are merely minor, if they occur at all. (That opinion - which Dr. Hughes testified he disagreed with, citing no reason other than that it had not come directly from a pharmacologist - was also the opinion given in evidence by Dr. Grossman. In any case, Dr Hughes did not bother to look further into that question.)

(4) That the only significant side effect of Beclovent is oral thrush, which can be avoided by rinsing the mouth after inhalation. (That was also the opinion of Dr. Grossman, with whom Dr. Hughes said he would not disagree, although he suggested that there might be other side effects because Beclovent is a steroid, upon which cryptic observation he did not elaborate.)

(5) That he had sought information from an allergist and a respirologist precisely because they had the expertise that he lacked in these matters.

(6) That the accuracy of an assessment of a person's medical condition is related both to the physician's experience in the field in question and to the extent of his or her professional contact with that person.

After eliciting the above admissions from him, counsel for the Commission had the following exchange with Dr. Hughes:

Q. So the allergist who has been seeing Mr. Morgoch since 1974 says in his opinion Mr. Morgoch can perform as a fire fighter.

A. Yes.

Q. You're not better informed about Mr. Morgoch than he is, are you?

A. I agree with you.

Q. And Dr. Grossman, who has reviewed the file from that allergist over the past 15 years, has indicated that in his opinion, having looked at this file, he sees no problem with Mr. Morgoch performing as a fire fighter. And you're not better informed about this man than Dr. Grossman is, are you?

A. I agree with you.

Q. And Dr. Dehejia, in Ottawa, who examined Mr. Morgoch from an allergy perspective, wrote back to say that he saw no contraindications from an allergy perspective about Mr. Morgoch performing as a fire fighter. You got that back from him, didn't you?

A. Yes, I did.

Not having yet received a response to his 1986 application, Mr. Morgoch wrote to the City on September 8th to inquire as to its status. That letter received no reply, and he testified that he heard nothing at all from the City until November or December. Indeed, although it had already been decided to "temporarily fail" him again for medical reasons, that decision was never communicated to Mr. Morgoch. However, on December 19th, 1986, he received information necessary to complete a 1987 application, which he forwarded on January 15th, 1987.

Mr. Morgoch's complaint under the Code continued to be pursued concurrently with his on-going and routine efforts to obtain employment as a fire fighter with the Ottawa Fire

Department. In regard to the former, a letter written by the City's Director of Human Resources Administration, Anne Murray, to an officer of the Commission was filed as tab 50 of Exhibit Number 6. That letter, which is dated the 27th of February, 1987, purports to review the correspondence between the City and the complainant and concludes as follows:

> As Mr. Morgoch did not provide the clarification requested, we were not provided the opportunity to assess whether or not Mr. Morgoch met the qualifications.
>
> In fact, until Mr. Morgoch agreed to be assessed by Dr. Dehejia after the initial fact finding meeting with the Commission, there was no current allergy testing provided, as had clearly been a requirement.
>
> Since Mr. Morgoch was the author of his own rejection from the recruitment process, it is our contention that Mr. Morgoch does not have a case ... [and] we contend that the resolution should be to have Mr. Morgoch follow all the normal recruitment steps in the 1987 process.

That letter as a whole strikes me as an exercise in obfuscation, and its conclusion begs the question as to whether the requirements referred to were lawful in the first place. Obviously a prospective employer cannot set up unlawfully discriminatory medical (or other) standards in respect of which applicants must submit themselves to uncomfortable physical tests in order to avoid becoming the authors of their own rejection from the recruitment process, particularly where expert medical opinion may deem such tests redundant.

Following the exchange of a series of letters pertaining to the medical stage of his 1987 application, Mr. Morgoch received a letter from Ms. Murray, dated July 7th, 1987, which reads in part

as follows:

> Your current medication, which you indicate are Beconase and Fivent are delivered in aerosol form. Given Dr. Dehejia's position that you need not be "on an aggressive, anti-allergic regime" would you have your physician investigate whether your medications can be switched to Hismanal and/or Seldane which would do away with the concerns about aerosol delivery and the drowsiness side effects. If, of course, your physician has a treatment other than Hismanal and/or Seldane which achieves the same result, that will be acceptable providing the City medical advisers review the report and concur.

Ms. Murray's evidence was that, since she was totally lacking in medical expertise, these aspects of her letters were based on information supplied by "the City's medical advisers". Those advisors knew, or ought to have known by then, that there were no side effects to Mr. Morgoch's medications that could be of any true concern regarding his medical fitness to carry out the work of a fire fighter. They also knew that aerosol delivery posed no problem. Nevertheless, Mr. Morgoch wrote to Dr. Dehejia requesting that he answer a number of specific questions (which, in my submission, Dr. Hughes ought to have put himself if he truly had had any remaining concerns):

1. Having regard to the continuing concern of the City that heat may cause aerosol containers to explode (which concern was known by then to be unfounded), "Can Fivent, Beconase and Ventolin be used in an non-aerosol form; i.e.: aqueous or spinhaler form?" Dr. Dehejia's reply was that they "can be administered in non-aerosol forms. However I am not sure if the spinhaler and the aqueous sprays are fire-resistant." (An implication of the question and answer is that the respondent knew that the complainant was using an aerosol can, that a spinhaler is not an aerosol can, and that therefore the respondent knew that the complainant was not using a spinhaler.)
2. Are they "known as drugs that produce drowsiness as a general or common side effect?" The answer: "Fivent,

Beconase and Ventolin do not cause drowsiness as a common side effect."

3. "Is [my] use the proper use of these medications; i.e.: preventative and symptomatic. Also, do you feel that this is an aggressive or non-aggressive anti-allergic regime?" The answer: "Yes, you are using the medications correctly. The regime is non-aggressive."
4. "As the Fivent and Opticrom are working well for me is a change to Histamal or Seldane warranted?" The answer: "If Fivent and Opticrom are working well a change to Seldane or Hismanal is not required."

Mr. Morgoch sent copies of this correspondence to Ms. Murray on July 26th, 1987. She referred that letter to "the City's medical advisors". In the absence of any evidence that he had been replaced as the City's occupational health consultant, or that he had in turn consulted anyone other than those already referred to, it must be presumed that the advisors referred to were Dr. Hughes and/or the City's occupational health nurses.

Ms. Murray replied to Mr. Morgoch on September 24th, 1987, purporting to set out the "opinion" she had received from her medical advisors, on the basis of which she advised him that the City must maintain its previous position. The "opinion" on which she says she relied is set forth in her letter in three numbered paragraphs. The first paragraph states that Fivent is a sodium cromoglycate which can be delivered in a dry form through a spinhaler, in which case it has certain side effects which "are not acceptable safety risk factors." Not only was no evidence offered (then or ever) for the assumption that the risks involved are unacceptable where Fivent is taken in a dry form by spinhaler, but even if a fire fighter's use of a spinhaler were undesirable, it is beyond question that it was by then known to

the City and all its advisors that Mr. Morgoch used an inhaler. It was next stated that "Beconase is a Betamethasone Benzoate and is available as an aerosol, rotocap or rotohaler all of which must be inhaled." However, no adverse conclusion is drawn or even hinted at in relation to this purely gratuitous statement which the innocent lay person might assume to be a dire consequence in the context of reasons given by "medical advisors" as to why the user of Beconase ought not to be permitted to fight fires. The third paragraph of the "opinion" states that: "Ventolin is a Salbutamal which is delivered through an inhaler or orally. The adverse effects are among other things tremors, occasional palpitations, nervousness, potential leg cramping and increased heart rate. These are not acceptable safety risks." However, as the advisors knew or ought to have known, these side effects are exceedingly rare when Ventolin is taken by inhaler, as they knew to be the case with Mr. Morgoch.

The substance of this pronouncement upon the complainant's medical condition and consequent physical capacities struck me as appalling in the circumstances, and I found its prescriptive advice quite impertinent. Moreover, as it turns out, this "opinion of her medical advisors" was simply culled from a "pharmacological textbook" by Ms. Murray and the "Occupational Health people" with whom she "sat down and that's what we put together". (Evidence, Volume 7, p. 47.)

If, when this letter was written, the City truly had any remaining "concerns" regarding Mr. Morgoch's application, by its

own admission they had been reduced to the possible side effects of his medications. Notwithstanding that it was known to be contrary to the advice provided by Dr. Warren and the City's external consultant on allergies, it was put to Mr. Morgoch by these non-experts in the field that if he would but accede to their demands and switch his medication to Hismanal or Seldane he would be accepted for the next stage of the recruitment process. Indeed, since the drugs they were prescribing had side effects that might make him "uncomfortable" but "would not likely pose a safety risk", should he not want to take Hismanal or Seldane, he was provided with an alternative: if he would but quit his present effective regime (which posed no problems, and which his respirologist and the City's expert said was non-aggressive), then he would be allowed to proceed to the next stage of the recruitment process - provided, of course, the City's medical advisers (presumably these same non-experts) approved of the new regime.

Not only is it clear that the concerns expressed by the City had been reduced to the side effects of the medications taken by the complainant, but it is equally clear that those concerns were unfounded, and that long before September 24th, 1987, they ought to have been seen to have been unfounded. The respirologist consulted by Dr. Hughes in 1986 had indicated that a mild or nearly mild asthmatic would not be impeded by his condition from functioning properly as a fire fighter. Although Dr. Hughes had not had the benefit of Dr. Grossman's assessment, he was well

aware that both Dr. Warren and Dr. Dehejia considered Mr. Morgoch's condition to be sufficiently mild as to afford no impediment to his fire fighting ambition. Every indication that Mr. Morgoch had a mild (or extremely mild) asthmatic condition was on record and, if Dr. Hughes felt that he was justified in advocating rejection unless and until someone else drew the obvious inferences and spelled them out for him, clearly the onus was on him to seek that precision. For instance, upon receiving Dr. MacLeod's report (which was a generalization unrelated to Mr. Morgoch, of whose existence Dr. MacLeod was then unaware) suggesting that mild asthmatics could perform as fire fighters and that it might be discriminatory to prevent them from doing so, why did he not ask either the complainant's allergist, or the allergist he consulted (or both), whether Mr. Morgoch's asthmatic condition was mild, moderate or severe? Why did he not request Mr. Morgoch to take the PC20 test? Was it because at this stage, perhaps, he did not want to know?

The opinion provided by her "medical advisors", which seems to have been spawned by a determination to maintain an entrenched position regardless of all evidence to the contrary from their own expert consultants, led Ms. Murray to conclude her September 24th letter to Mr. Morgoch as follows:

> ... we must continue to maintain our position that your current medication of Fivent, Beconase and Ventolin are not acceptable. ... My letter to you of July 7, 1987 asked you to have your physician investigate whether your medications could be switched to Hismanal and/or Seldane which would do away with the concerns about your current medication. The reference to drowsiness side effects in my letter related to the common side

> effect of many antihistamines [emphasis added], a side effect which Seldane and Hismanal do not possess. The letter further went on to state: "If, of course, your physician has a treatment other than Hismanal and/or Seldane which achieves the same result, that will be acceptable providing the City's medical advisors review the report and concur." While it does not appear from your letter of July 26, 1987 that you did any of this, we would like to confirm that this option is still open to you.

Mr. Morgoch did not comply with these requirements, and he heard nothing further from the City regarding his 1987 application. In the circumstances, when the nuclear power plant in Deep River closed Mr. Morgoch moved to Simcoe, Ontario, in order to retain his employment.

Finally, with respect to the issue of liability, the respondent did not point to any collateral duties required of fire fighters that Mr. Morgoch's handicap would prevent him from accomplishing and which the City could not accommodate. It was not contended that he could not leave his medication on the fire truck in case of need. Moreover, since Ottawa fire fighters are entitled to a total of 36 days of sick leave annually, any occasional need for Mr. Morgoch to stay off work because of his allergies could be easily accommodated. In this context it should be remembered that he missed only fourteen days work in twelve years, six days of which at most could have been attributable to his allergies (and perhaps none were). Moreover, for several of these years he was a volunteer fire fighter encountering the very risks that were of concern.

As indicated at the outset, the law applicable to the circumstances of this complaint is clear, and it is not in

dispute. The foregoing review of the evidence shows clearly that the respondent has failed to discharge the onus of showing that, owing to his handicap, the complainant lacks the capacity of carrying out the essential tasks of a City of Ottawa fire fighter, or that there are any collateral duties connected with such employment which could not be accommodated. Indeed, the evidence adduced by the Commission amounts to affirmative proof that Mr. Morgoch's handicap was (and is) no impediment to his capacity to work for the City as a fire fighter. Moreover, that fact was either known, or ought to have been known, by the respondent at least by the time of its rejection of the second application. And that is a circumstance which must be considered in relation to the matter of remedies, to which I now turn.

THE MATTER OF REMEDIES

The scope of the orders that can be made by a board upon finding the respondent liable in circumstances such as those involved here is set out in the following provisions of the Code:

> 40.-(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices, and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for

mental anguish.

Dealing first with paragraph 40(1)(b), it should be noted that the complainant made no claim to compensation for lost wages because right from the time of his first application he has been earning more than he would have been paid had he obtained employment as an Ottawa fire fighter. However, an itemized account of expenses incurred by him in pursuing this matter after his first rejection, totalling $1,116.59, was filed as an exhibit (Number 8, Tab 2). This figure, along with the additional sum of $307.06 as interest accruing at the agreed-upon rate of 11% from January 1st, 1987 to the end of June, 1989, was accepted by counsel for the respondent. (See Volume 9, p. 74.)

In addition to these special damages, the Commission claims that the complainant is entitled to general damages under paragraph 40(1)(b) of the Code. Evidence of depression or other physical manifestation thereof is not required in order to attract an award of general damages for mental anguish under this provision. (See, for instance, Underwood v. Board of Commissioners of Police for Smiths Falls (1985), 7 C.H.R.R. D/3176.) Injury to the complainant's dignity and self-respect, and the deprivation of his right to freedom from discrimination, are among the kinds of injuries intended to be alleviated by that provision, as is made plain by the decision of the Supreme Court of Ontario (Divisional Court) in Foster Wheeler Limited v. Ontario Human Rights Commission and Scott (1987), 8 C.H.R.R. D/4179 (at D/4180, paragraph 33025):

> When a person is denied recruitment because of his race that infringement of right should attract damages for insult to dignity as well as the foregoing loss of income. Such damages flow directly from the denial or discriminatory act. While each case will depend on its particular facts, and the award of $4,500 is higher than normal, we see no reason to interfere with it.

The matter of general damages under paragraph 40(1)(b) of the Code was considered at great length in Cameron v. Nel-Gor Castle Nursing Home and Nelson (1984), 5 C.H.R.R. D/2170, in which the following was said:

> [The Code] allows for the award of general damages for, inter alia, injury to dignity and self-respect, and loss of the right to freedom from discrimination. (Paragraph 18537.)
>
> Where a contravention of the Code results in injury to the complainant's dignity os self-respect, general damages for this loss should reflect the seriousness of the injury caused. (Paragraph 18538.)
>
> An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based on the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers. (Paragraph 18539.)
>
> It seems to me that the first two lines of paragraph 40(1)(b) afford a complainant with the remedy of special and general damages as provided by the old Code as interpreted by boards of inquiry, and that the last three lines of paragraph 40(1)(b) go further, and provide for what is, in effect, punitive damages "where the infringement has been engaged in wilfully or recklessly." (Paragraph 18548.)
>
> In my view, the last three lines of paragraph 40(1)(b) of the Ontario Code must be interpreted as meaning that an award beyond mere compensation (which may be awarded under the first two lines of paragraph 40(1)(b)) may be given, and such award can have a punitive element (even though called monetary "compensation" when the circumstances of the last three

lines are present.

This view was applied by me in Underwood (supra), where the "circumstances of the last three lines" of paragraph 40(1)(b) were present, resulting in a punitive element being included in the award of general damages.

The measure of general damages requires a consideration of two factors: first, the effect the discrimination had upon the complainant and, second (if any punitive element is to be included), whether that discrimination was engaged in wilfully or recklessly.

As to the effect upon the complainant of the respondent's treatment of him, Mr. Morgoch testified that he was upset and angered by his initial rejection, but determined to persist with his application. He was convinced of his capacity to work as a full-time fire fighter, and he knew that his allergies were no impediment. It was obvious that he did his utmost to convince the City's authorities as well, and that he found his inability to get through to them frustrating in the extreme.

Mr. Morgoch was aware when he first applied that the medical assessment stage of the recruitment process would be followed by a fitness test (conducted by the Physical Recreation Centre of Carleton University), then by an agility test (conducted by the Fire Department) and, finally, by an interview with the Fire Chief (which appeared to be pro forma only, since no one was known to have ever been turned down as a result of that interview). Armed with this knowledge, in each of the three years

in which he had applications pending Mr. Morgoch trained long and diligently in preparation for the anticipated physical tests, jogging and working out with weights. Indeed, at one point his excessive zeal resulted in shoulder injuries (bursitis) for which he was treated, eventually recovering. During his training periods, Mr. Morgoch worked out several nights a week. When asked specifically for an estimate of the number of hours he worked out in 1986 he said "in the neighbourhood of four to five hundred hours". (Volume 1, p. 143.)

Mr. Morgoch's great pre-occupation with the successive rejections of his applications for reasons he knew to be unfounded had a clearly adverse impact upon him, causing him to upset his family, a circumstance which only served to exacerbate his own situation. This aspect of the matter was brought out particularly clearly in the following testimony given by his wife regarding the way in which her husband's rejection by the City of Ottawa affected her life (Volume 3, pp. 334-335):

> It became very difficult because he so much wanted to do this, and he was so capable and able to do it that it was unfathomable to him that he should be rejected for something that he had proven would in no way disable him. So he became very difficult to get along with, very exasperated, very single-minded, and it made my life very difficult because now I had to live to this regime of him trying to get this job.
>
> It meant that when he trained that he rushed in the door, he went out jogging, his dinner had to be on the table, he had to eat and then go.
>
> It meant he was out of the house every evening [note that his testimony was three or four evenings] so that if I needed to go somewhere or do something I had to arrange for a baby sitter for our daughter.

> It meant that our daughter saw very little of her father between him rushing out of the door to go jogging or rushing off to do weight lifting. By the time he would get home she would be in bed. So she was feeling pretty rejected about the whole thing, too.

Mr. Morgoch was put to a great deal of other trouble by the City's shifting demands regarding his successive applications, each of which was ultimately rejected. He lost considerable time in preparing extensive correspondence and in travelling to Ottawa, and he needlessly subjected himself to the discomfort of allergy tests at the behest of the respondent in order either to verify or refute his own allergist's report on his condition.

As to whether the award of general damages that might be assessed in consequence of the above findings ought to reflect a punitive element, I would begin by observing that the complainant was wrongfully rejected not once, but three times! Each rejection was a separate contravention of the provisions of the Code and a distinct infringement of Mr. Morgoch's right thereunder. In my opinion, the evidence regarding liability which was reviewed earlier demonstrates that the respondent's successive infringements of the complainant's right were engaged in recklessly, if not wilfully, and that these rejections became progressively more blatant.

Those entrusted by the City with the assessment of Mr. Morgoch's medical condition had sufficient information, at least by the time of the filing of his complaint, to know that their "concerns" were unfounded and that their discrimination was therefore unjustifiable. If in fact they knew this to be so, then

in persisting in thrusting forward these same concerns as the reasons for rejection, they knowingly or deliberately (that is to say, "wilfully") infringed the complainant's right. If they did not know that their concerns were unfounded, the only explanation would appear to be culpable ignorance. In any case, I would find unbelievable any suggestion that they did not even know enough to realize that they should at least have addressed clearer and more specific inquiries not only to their own experts, but to Dr. Warren. In my view, that failure alone in the circumstances of this case would be sufficient to base a finding that the discrimination was "engaged in recklessly". It was clearly "such as to evince disregard of or indifference to consequences, that is the conduct [was] done with rashness or heedlessness." (Cameron, supra, paragraph 18546.)

In the course of dealing with the Commission's argument that the respondent had acted so reprehensively as to warrant inclusion of a punitive element in the award of general damages, counsel for the respondent made this comment (Volume 9, at pp. 67-68):

> In connection with that matter, if the City had not referred the matter to Dr. Hughes, if Dr. Hughes had not requested opinions from Dr. Dehejia and Dr. MacLeod, then perhaps I think it would be open for someone to say, or to make the submission, that the City did not do everything it could to attempt to make an informed decision. But I submit the City did do that. The City solicited opinions from Dr. MacLeod, the respirologist. The City solicited an opinion from Dr. Dehejia in connection with these matters. If there had been some sinister purpose, if there was a concerted effort that Mr. Morgoch would not become a fire fighter at any cost, no matter what would happen, surely the City would not go through the process of soliciting

> these opinions. In my submission, with the '86 and '87 applications there was not a sinister purpose involved and the City was consistent in its position in attempting in good faith to apply the standards which they believed, based on the input from their Occupational Health Department and their consultants, were appropriate in the circumstances.

What this submission suggests is simply that, in soliciting through Dr. Hughes the opinions of Dr. MacLeod and Dr. Dehejia, the City had done all that it could reasonably be expected to have done. What this submission ignores is the fact that Dr. Hughes and the Occupational Health Department (or "group") did not accept the expert advice they got in response to his "loaded" inquiry! That advice seemed pretty clear to me, a lay person: even in the context of a "very strict screening program" required "in order to maintain an above-average level of safety" it would be discriminatory, according to Dr. MacLeod, to deny such employment to anyone simply because he or she was a mild asthmatic; and, according to Dr. Dehjia, there would be no foreseeable medical problems in Mr. Morgoch's undertaking that work. If that advice was equally clear to Dr. Hughes and the occupational health nurses, they acted wilfully; if it was not clear to them then, in not seeking clarification, they acted recklessly.

In my opinion, counsel for the Commission is correct in his submission (Volume 9, p.90) that the respondent did not enter upon a "<u>bona fide</u> exercise to get a better assessment of David Morgoch." The City had been served with a human rights complaint and "it was an exercise designed to shore up the City's position.

... Nothing was sought from Dr. Warren at that point [or, indeed, ever]. It was a gathering of ammunition to support the City. It was not a gathering of information to make a better assessment of Mr. Morgoch". And, in my view, when the replies to his "loaded" letter failed to buttress his entrenched position, Dr. Hughes stubbornly and rashly decided to "maintain" his position.

As counsel for the Commission said in support of his submission that an award of general damages in the order of $8,000 was called for, "the City started out with an error of judgment, and they became increasingly reckless in the way they treated" Mr. Morgoch. He was, indeed, "led down the garden path for two [more] years with a shifting defence to his application", and by suggestions that compliance with their obviously impossible or undesirable conditions would lead to eventual acceptance. In consequence, "three years of dedicated work on his part to get there have been wasted" and he has endured "a disruption of his family life". (See Volume 9, pp. 38 ff.)

As to the law applicable in these circumstances, I believe the following observations made by me in Underwood (supra, at D/3184) are of some relevance:

> The setting of the maximum amount that may be awarded as general damages at $10,000 is undoubtedly a reflection of legislative concern over the extent of power to be conferred on boards of inquiry under the Code, and not meant as a benchmark against which these awards are to be measured. ... Obviously, the worst conceivable cases of mental anguish could not be adequately redressed by an award of $10,000 in general damages, and if all other cases are to be scaled down according to the relative degree of anguish suffered, the quantum of general damages awarded in most cases would be trivial.

> [and where] punitive-type reasoning has been invoked the award of general damages might indeed be high. For instance, in Hendry v. Liquor Control Board of Ontario, (1980) 1 C.H.R.R. D/160, where employment had been denied because of the complainant's sex, the board awarded her back pay and an additional sum [of $8,000] as general damages.

Although the appropriate quantum of general damages to be awarded in any particular case must reflect the circumstances unique to that case, it is both apt and usual to determine that amount in the light of the decisions of other boards of inquiry. Such awards have been increasing over the years, and not just as a consequence of taking into account the inflationary factor which may convert once appropriate sums into mere license fees. The increasing quantum of general damages awards under the Code reflects changing perceptions as well, and "it is apparent that the initial reticence of boards of inquiry to make more than the most minimal awards is giving way to the view that the damages ought to be more substantial." (Underwood, supra, paragraph 25469.) In this respect I find the following passage from the decision of Professor Cumming in Cameron (supra, paragraph 18526) most appropriate:

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code: It is necessary that damage awards not trivialize or diminish respect for the public policy declared in the Human Rights Code.

An examination simply of the cases cited by counsel in argument demonstrates the increasing level of general damages awards over the past several years. In 1984, Professor Cumming made an award of general damages in the Cameron case in the amount of $2,000, which amount was intended to reflect a punitive element. In 1988, in the Belliveau case, the complainant was "the person who is primarily responsible for his lack of reinstatement" and his own negligence "must impact very significantly upon any remedies he is otherwise entitled to". (D/5256, paragraph 39618. Emphasis added.) Having regard to those circumstances, Professor Cumming was "of the view that the complainant's damages should be limited to a relatively nominal sum", which he fixed at $2,000.(See Paragraph 39619. Emphasis added.) An amount that reflected a punitive element four years earlier was in 1988 regarded as a nominal award to be given to a complainant who was largely reponsible for his own predicament. The Divisional Court in Wheeler (supra) referred to a general damages award of $4,500, together with an additional sum as interest calculated retroactively thereon, was made on November 18th, 1985, as having been "higher than normal" at the time, but it "saw no reason to interfere with it". In making that award in Wheeler, Professor Hunter recognized "the very serious effect of discrimination on this particular complainant". (Scott v. Foster Wheeler Ltd. (1986), 7 C.H.R.R. D/3193.) However, not only was that order made four years ago, but no punitive element was involved.

It seems to me that an award of $8,000 as requested by the Commission would be somewhat excessive in the circumstances of this case. However, having regard to the effect upon Mr. Morgoch and his family of the respondent's repeated infringements of his rights, engaged in wilfully or recklessly on two successive occasions during the period in which the complaint protesting the first infringement was pending, an award of $6,500 seems entirely appropriate to me. (As that amount is meant to reflect injuries suffered to date, no additional amount calculated retroactively as interest will be ordered.)

The Commission also sought as additional remedies two orders under s. 40(1)(a): one related to Mr. Morgoch's complaint, the other in respect of future practices of the respondent.

The order sought as to future practices is one that would require the City, in consultation with the Commission, to amend the health standards in its fire fighter's recruitment manual as they relate to allergies. That standard states (inter alia) that "any reaction on allergy testing is cause for rejection". Unlike other provisions in the health standards, such as that relating to the cardiovascular system, it does not simply regard the disclosed (or discovered) abnormality as something "to be assessed by a [specialist] to ensure that it will not in any way hamper the applicant's efficiency as a fire fighter". The present standard is clearly too wide and, if applied literally by some officious recruitment officer, would cause the rejection of others with conditions similar to those of David Morgoch.

Consequently, an order to this effect will be made.

It was also argued by the Commission that, if Mr. Morgoch's exclusion from proceeding beyond the medical examination stage of the recruitment process was unjustifiable, then he is entitled to undergo the fitness and agility tests and, depending upon the results of those tests, to receive from the respondent an offer of employment as a fire fighter. I agree with that submission and shall so order. I also agree that, should he be successful in these tests, the complainant is to be excused from the final stage of the process, namely, the interview that no one appears ever to have failed and in respect of which he may reasonably entertain an apprehension of bias.

Applicants who succeed in all stages of the recruitment process have their names placed on a list from which vacancies occurring in the Ottawa Fire Department in the year to which the competition relates would be filled according to a descending order of merit. A fresh list is drawn up each year. It is my decision that Mr. Morgoch is to be offered a position as a fire fighter with the Ottawa Fire Department if the results of his tests place him as high as any candidate who was accepted in any of the years for which he applied. As the agility test has changed since Mr. Morgoch's last application, it will be left to the parties to arrive at a mutually satisfactory arrangement in that regard.

As the nature of the orders I am making under s. 40(1)(a) of the Code requires it, I shall remain seized of this complaint in

order to deal with any disputes or questions that may arise in respect of the following matters: the re-formulation of the health standard in question; the timing, character and place of the tests to be taken by the complainant; the results of those tests, including placement on the priority list; collateral issues relating to any offer of employment, such as the date from which seniority is to run; any other relevant matters.

ORDER

Having found the respondent to be in breach of sections 4(1) and 8 of the Human Rights Code, 1981, S.O., c.53, as amended, it is hereby ordered as follows:

1. That the respondent pay to the complainant Mr. David Morgoch the sum of $1,423.65 as special damages and interest thereon.

2. That the respondent pay to the complainant Mr. David Morgoch the sum of $6,500 as general damages.

3. That arrangements be made to the satisfaction of the parties (or as determined by this board) for the complainant to undergo the fitness and agility tests involved in the respondent's fire fighters recruitment process; that he be offered such employment upon terms to be agreed to by the parties (or as determined by this board) should the results of such tests show that he would have been successful in any of his applications.

4. That the health standard relating to allergies used by the respondent in its fire fighters recruitment process be amended in consultation with the Ontario Human Rights Commission (or to the satisfaction of this board), so as to conform to the requirements of the Ontario Human Rights Code.

5. That the Ontario Human Rights Commission advise this board within six months of the date of this decision as to the extent to which this order has been complied with.

6. That this board shall remain seized of these matters until such time as this order, or any future orders that may be required, have been complied with.

Dated this 4th day of August, 1989.

H.A. Hubbard, Chairman